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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 570

SNELLING AND SNELLING OF BALTIMORE, INC., *Petitioner*

v.

ANGELO R. MASCARO, THE A. S. ABELL COMPANY AND THE C & P TELEPHONE COMPANY OF MARYLAND

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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Petitioner, Snelling and Snelling of Baltimore, Inc., prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland reversing a decree of the Circuit Court No. 2 of Baltimore City and vacating that court's injunction prohibiting Angelo R. Mascaro from advertising the trade name "Snelling and Snelling" in competition with petitioner in the employment agency business in Baltimore, Maryland unless Mascaro included in his use of the name explanatory language designated in the decree intended to distinguish his business from that being conducted by petitioner.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the Circuit Court No. 2 of Baltimore City (*infra*, Appendix D) is not reported. The opinion of the Court of Appeals of Maryland (*infra*, Appendix A, for majority opinion, Appendix B, for dissenting opinion) is reported at 250 Md. 215, 243 A.2d 1.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on May 31, 1968 (R. 1, 3, 24). ("R." refers to the record certified to this Court by the Court of Appeals of Maryland.) A timely motion for reargument, filed on June 26, 1968, was denied on June 28, 1968 (R. 1, 35). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3), since the judgment of the Court of Appeals of Maryland and its subsequent denial of petitioner's motion for reargument infringed rights, privileges and immunities specially set up and claimed under the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the judgment of a state appellate court reversing the decree of a state trial court, though involving issues of state law alone, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States when it is premised upon a ground which was neither raised, considered or decided in the state trial court nor briefed or argued in the state appellate court.

2. Whether petitioner has the exclusive right to use the trade name "Snelling and Snelling" in the employment agency business in Baltimore, Maryland and is hence entitled to exclude Angelo R. Mascaro or anyone else from using the name in the same business in that City.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

This cause began on January 7, 1966, when petitioner filed in the Circuit Court No. 2 of Baltimore City its bill in equity seeking to enjoin Angelo R. Mascaro from unfairly competing by using a trade name, "Snelling and Snelling", which petitioner had been using for about five years, in the employment agency business in Baltimore, Maryland and its environs. Petitioner also sought to enjoin The A. S. Abell Company, Baltimore publisher of daily newspapers of general circulation (the Sunpapers), from accepting from Mascaro advertising in which the trade name in issue appeared and to enjoin The C & P Telephone Company of Maryland, the local telephone company, from accepting from Mascaro for insertion in its local directories telephone listings or advertisements in which the trade name was employed. (E. 1-6) ("E." refers to the Joint Record Extract filed in the Court of Appeals of Maryland, part of the record certified by that court to this Court (R. 2).)

Petitioner, a Maryland corporation, was formed in July, 1960 to engage in the employment agency business. It began to do business in August, 1960. It has operated from the same office in Baltimore since that time. Its business consists of obtaining applicants for employment and placing them in jobs. It charges a fee based on a schedule of rates graduated according to starting salary. Maynard Z. Drossner has been petitioner's president, principal participant and managing officer and a director and stockholder since its inception. (E. 33, 34, 56, 313-314)

Petitioner used a trade name, "Snelling and Snelling", continually since 1960. Until December, 1965, petitioner and its permittees were the sole users of the name in the Baltimore area. During that period three companion companies, in each of which Drossner had an interest, joined petitioner, with its consent, in use of the name. These were Snelling and Snelling of Highlandtown, Inc., in December, 1963, Snelling and Snelling of Towson, Inc., in January, 1964, and Snelling and Snelling of Glen Burnie, Inc., in June, 1965. Each was a Maryland corporation formed by Drossner and others to engage in the employment agency business. Except for Drossner, each was under diverse ownership, different from that of petitioner. Each was located in an area in (Highlandtown) or near (Towson and Glen Burnie) Baltimore from which it took its respective corporate name. Ultimately the four companies functioned as a group in their advertising activities. (E. 33, 34, 315, 318, 409-414, 414-430, 430-447)

The name "Snelling and Snelling" had no trade or business value in 1960 in the Baltimore area. (At trial Drossner testified without contradiction that, "In fact it was our biggest liability rather than our biggest asset." (E. 36)) Despite initial difficulties, occasioned in part by residual effects from the business failure of an earlier, unsuccessful user of the name (*e.g.*, because petitioner employed the same trade name, creditors of the prior user, including newspapers and the telephone company, which supplied services essential to petitioner's business, dunned petitioner for its predecessor's unpaid bills and displayed a reluctance to deal with petitioner at all) and after a hiatus in the use of the name for a year and a half following that failure, by 1965, through vigorous business practices and extensive newspaper, television and radio advertising involving expenditures in the range of $100,000, petitioner had elevated the name "Snelling and Snelling" to be the paramount trade name, representing the largest operator, in the employment agency business in the Baltimore area. Thereupon Mascaro appeared, in Dundalk, Maryland, a section of Baltimore County sharing a common

boundary with Baltimore City, and began advertising the same trade name as petitioner was using, viz. "Snelling and Snelling", in the same business in which petitioner was engaged, in the same area in which petitioner was operating, in newspapers published in Baltimore and circulated there and in surrounding areas. Petitioner promptly sought to enjoin him. (E. 1-6, 36-38, 57, 60, 63, 72, 300, 301)

Petitioner first acquired the right to use the trade name "Snelling and Snelling" by virtue of a franchise or licensing agreement with Snelling and Snelling, Inc., a Pennsylvania corporation engaged, *inter alia*, in selling franchises in the employment agency field. Petitioner's contract, made in Philadelphia on July 5, 1960, provided in pertinent part as follows: (Snelling and Snelling, Inc. is referred to in the contract as "SNELLING". Petitioner is referred to therein as "LICENSEE".)

* * *

> "1. (a) SNELLING hereby grants to LICENSEE the *exclusive right* to use the name SNELLING and SNELLING and/or SNELLING and SNELLING of BALTIMORE, INC. in connection with one office only to be opened by LICENSEE in Baltimore, Maryland. LICENSEE shall not directly or indirectly establish an office or place of business, or move to any locations outside of such territory; nor shall LICENSEE change its name without first obtaining the written consent of SNELLING; nor shall LICENSEE establish any branch or additional office without the written consent of SNELLING." (E. 386) (Emphasis supplied.)

* * *

> "LICENSEE agrees * * * when requested by SNELLING, to waive any and all objections LICENSEE may legally have against the use of the name 'SNELLING AND SNELLING' in territories other than that territory granted to LICENSEE herein." (E. 390)

Petitioner paid Snelling and Snelling, Inc. $2,000 for the franchise and agreed to pay, on a monthly basis, "an over-

ride" (E. 387) of five per cent of its gross monthly receipts, plus an additional two per cent of such receipts towards national advertising, later changed to a flat seven per cent override, all of which Snelling and Snelling, Inc. could use for whatever purposes it wished. The contract was written on a printed form, prepared and filled in by Snelling and Snelling, Inc. and its lawyer. Neither petitioner nor anyone in its behalf had anything to do with preparation of the contract. When the contract was signed, Snelling and Snelling, Inc. had about forty franchised offices, but none under diversified ownership in any suburbs of major cities in which there were offices operated by other franchisees, or adjacent to large metropolitan areas where there were offices operated by other franchisees, *i.e.*, none where any confrontation existed similar to that which arose between petitioner in Baltimore and Mascaro in Dundalk. (E. 1-6, 18, 73, 83, 100, 102, 109, 191, 229, 230-232, 238-240, 261, 294-295)

After a period of negotiation, Mascaro signed a franchise contract with Snelling and Snelling, Inc. on November 4, 1965, more than five years after petitioner's contract, for the Dundalk-Essex area, adjacent to Baltimore City. He knew of the prior presence of petitioner and its companion companies. He was aware of contentions about his area before he signed, although he denied knowing of the "exclusive right" form of petitioner's contract. Before he had completed arrangements for opening his office, he knew that petitioner had a serious complaint which might affect his ability to operate. He sought reassurance from Snelling and Snelling, Inc. at least fifteen or twenty times. He was reassured on each occasion. Part of such reassurance was a promise by Snelling and Snelling, Inc. to pay for defense of any litigation which might ensue. That company in fact paid for Mascaro's defense in this cause. (E. 116-121, 130, 132, 143-145, 174-176, 263, 467-482)

Throughout their dealings, Snelling and Snelling, Inc. endeavored, unsuccessfully, to get petitioner to give up its "exclusive right" form of contract. Snelling and Snelling,

Inc. discontinued use of that form of contract. None of the other contracts put in evidence at trial of this cause, *i.e.*, those of Snelling and Snelling of Highlandtown, Inc., Snelling and Snelling of Towson, Inc. and Snelling and Snelling of Glen Burnie, Inc. (each of which had a contract with Snelling and Snelling, Inc.), a blank form of contract in use by Snelling and Snelling, Inc. at time of trial and Mascaro's contract, contained the "exclusive right" language. From its inception to September 30, 1966, petitioner paid Snelling and Snelling, Inc. more than $65,000 in overrides and advertising payments. (E. 237, 298, 299, 300, 301, 302, 361-367, 378, 395-409, 409-414, 414-430, 467-482)

Advertising is the *sine qua non* of the employment agency business. All involved acknowledged as much. At trial Drossner said that without advertising "we would have no business" (E. 58). Robert O. Snelling, Jr., president of Snelling and Snelling, Inc., a witness for Mascaro and one of his principal protagonists, said that "the only way we * * * (solicit applicants) is through advertising" (E. 219) and noted that "to get an applicant through the door you have to put an ad in the paper" (E. 250). Mascaro said that "[a]s Mr. Drossner has put it, the advertising is the life line of this business" (E. 134). Robert O. Snelling, Jr. agreed (E. 247).

In its bill of complaint petitioner alleged a proprietary interest in the trade name "Snelling and Snelling" by reason of its prior user of and development of value in the name. It did not include any averments referring to its contract with Snelling and Snelling, Inc. In his answer Mascaro, *inter alia*, averred that petitioner was "guilty of unclean hands in that the Bill of Complaint * * * fails to make a full and frank disclosure of all the facts, to wit, that both Complainant and Defendant are licensees of Snelling and Snelling, Inc. * * * by virtue of contracts dated July 5th, 1960 and November 4th, 1965, respectively." (E. 16, 17) That was the sole basis upon which Mascaro relied for his proposed defense of "unclean hands". (E. 12-17)

Following mesne proceedings (E. 6-11, 12-17), including a preliminary hearing which resulted in an interlocutory order, made on February 2, 1966, imposing upon all defendants an "explanatory phrase" injunction pending full hearing and final determination on the merits (E. 11-12), the case was tried in the Circuit Court No. 2 of Baltimore City (Charles D. Harris, Judge) from October 25, 1966 to October 31, 1966. Voluminous testimony was taken (E. 32-312). Numerous exhibits were introduced (E. 313-511).

Ample evidence of public confusion caused by Mascaro's openly acknowledged use of the identical trade name employed by petitioner was adduced. Among those shown to have been confused were a young job applicant, his mother, the billing department of the Sunpapers, the State Department of Labor and Industry of Maryland, which licenses employment agencies, and the United States Treasury Department. (E. 112-114, 265-282, 295-298, 358-360)

No mention was made at trial of any "estoppel" defense. Mascaro's chief defense, propounded for him by his witness Robert O. Snelling, Jr., was that his competing with petitioner was not really harmful, but was actually helpful, to petitioner, since (in the words of the court, in its memorandum opinion, summarizing Snelling's remarks on the subject) "each office works not only for itself but for the benefit of all other Snelling and Snelling offices, in a manner akin to a 'one big happy family' arrangement" (E. 25). Later, when asked why his company, as a consideration for allowing Snelling and Snelling of Highlandtown, Inc. to open its office (with petitioner's consent) in Highlandtown, a section of Baltimore bordering on Dundalk, had exacted a change in petitioner's override arrangement, Snelling indicated the reason was that the presence of an office in Highlandtown would adversely affect his company's ability to sell the Dundalk-Essex area, a position inconsistent with his earlier "one big happy family" theory. He said, on the point, "No, there was no charge, I got him (Drossner) to change his contract. I had no obligation to allow him to open that office. Of course, he was putting it close enough to a bor-

der to kill the potential sale of a franchise in the suburbs possibly, and because of this, I exacted a change in the franchise agreement to seven per cent." (E. 260) Snelling acknowledged that Mascaro's advertising constituted use by Mascaro of the trade name "Snelling and Snelling" in Baltimore. (E. 247-250)

On December 6, 1966, the Circuit Court No. 2 of Baltimore City filed its memorandum opinion (*infra*, Appendix D). The court rejected petitioner's common law contentions and decided the case on the basis of petitioner's contract with Snelling and Snelling, Inc. The court concerned itself particularly with construction of the portion of that contract which granted to petitioner "* * * the *exclusive* right to use the name SNELLING AND SNELLING * * * in connection with one office only to be opened * * * *in Baltimore, Maryland*". (E. 18) (Emphasis is the court's.) The court interpreted that language as granting petitioner the exclusive right to use the name involved in Baltimore City, such exclusive right to be exercised in connection with one office only in that city. The court found that Mascaro, as licensee under his agreement with Snelling and Snelling, Inc., was by using the name "Snelling and Snelling" in Baltimore City unfairly competing with petitioner. The court found that Mascaro's activities in Baltimore City, as for instance, his advertising, though carried on from his office in Dundalk, infringed petitioner's exclusive right. The court hence afforded petitioner injunctive relief. The court declined to extend the injunction to The A. S. Abell Company or The C & P Telephone Company because they were not parties to the contracts involved. (E. 30) In its memorandum opinion, the court made no mention of any "estoppel" point.

On January 4, 1968, the court filed its decree (*infra*, Appendix E). The injunction thereby imposed upon Mascaro required him to accompany his public use of the name "Snelling and Snelling" with the identifying designation, "of Dundalk-Essex, A. R. Mascaro" (E. 31), and the explanatory legend, "not connected with any other Snelling and Snelling

office in this (or 'the Baltimore') area" (E. 32). The decree made no mention of any "estoppel" point or principle.

Mascaro appealed from the decree. Petitioner, because the court failed to issue an outright, rather than an "explanatory phrase" injunction and to include within its scope The A. S. Abell Company and The C & P Telephone Company as well as Mascaro, cross appealed. The appeals were filed in the Court of Appeals of Maryland on August 14, 1967. (R. 1) Thereafter briefs were filed (two on each side, one in the appeal and one in the cross appeal) by petitioner and by Mascaro. The A. S. Abell Company and The C & P Telephone Company, though parties to the appeals (at least to the cross appeal) did not file briefs, or appear at argument, or take any active part in the case. No "estoppel" point was mentioned in any of the briefs filed.

The case was argued on April 5, 1968, before a panel of five judges. On May 31, 1968, the Court of Appeals of Maryland filed its opinion (*infra*, Appendix A) and entered its judgment. It reversed the decree of the Circuit Court No. 2 of Baltimore City and vacated the injunction imposed upon Mascaro by that court. (R. 1) One judge, Judge Horney, participated in the hearing of the case, in the conference in regard to its decision and in the adoption of the opinion, but had retired from the court prior to the filing of the opinion. (R. 3) One judge, Judge Barnes, dissented and filed his dissenting opinion (*infra*, Appendix B), also on May 31, 1968. (R. 1)

In the majority opinion, the Court of Appeals of Maryland, as one basis for reversing the decree of the trial court and vacating the injunction against Mascaro, found that petitioner was estopped from obtaining the relief which it sought. The court held that the estoppel principle prevented petitioner from attacking Snelling and Snelling, Inc.'s licensing system, which resulted in Mascaro's competing with petitioner *in Baltimore City*, because Drossner, petitioner's principal participant, had himself benefited by that same system. The majority of the court said on the point that:

> "* * * Drossner is estopped from challenging the validity of the licensing system which he used to his own advantage when he obtained the Towson and Glen Burnie franchises, and from attempting to impose upon Mascaro limitations with respect to access to communications media which he did not assert against Towson and Glen Burnie. To permit him to do so would be to sanction the weaving of the very web of broader exclusivity which be failed to achieve by contract. * * *" (*Infra,* Appendix A, at page App 20)

The majority of the court also held that petitioner's "exclusive right to use the name" Snelling and Snelling "in connection with one office only" "in Baltimore City" (E. 386), acquired from Snelling and Snelling, Inc. in the contract of July 5, 1960, was not really an exclusive right at all, not even so long as such use was connected with one office only in Baltimore City, but that petitioner's right was "not an unrestricted right" (R. 16) and that Snelling and Snelling, Inc. hence retained for itself "the right to use the name in Baltimore in ways not connected with the Baltimore office" (R. 16) and could assign that right to another, that is, in the instant cause, to Mascaro.

How the federal question is presented.

The federal question involved in the instant cause did not arise until the Court of Appeals of Maryland premised its judgment, adverse to petitioner, upon a ground, the principle of estoppel, which had not been raised, considered or decided in the trial court, or briefed or argued in the appellate court. That circumstance did not, as it could not, become known to petitioner until the opinion of the Court of Appeals of Maryland in this cause was filed. Thereupon, on June 26, 1968, petitioner filed in that court its timely motion for reargument. (R. 1, 35-47; *infra,* Appendix C) (An application for rehearing of a cause in the Court of Appeals of Maryland is required to be made by means of a "motion for reargument". Maryland Rules of Procedure, Rule 850.) That motion, in part, went on the ground that

the judgment there was invalid because based upon determination by the court of an issue as to which petitioner had been afforded neither notice nor hearing, *viz.* the issue of the existence *vel non* of an estoppel operating against petitioner, in violation of the requirements of the Due Process and Equal Protection Clauses of the Constitution of the United States. The motion was denied, without opinion or comment by the court, on June 28, 1968. Thus, as soon as it was necessary or appropriate to do so, in the highest court of Maryland as it happened, petitioner presented the federal questions here involved, which was there finally decided against it.

REASONS FOR GRANTING THE WRIT

A state court has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court.

In its opinion below, the Court of Appeals of Maryland, one judge dissenting, announced as a basis for its judgment adverse to petitioner that petitioner was estopped, because of the conduct of one of its principals, Drossner, to claim the relief which it sought in this cause. That pronouncement represented the very first time in the entire case that such an issue of estoppel had been raised, considered, briefed, argued or decided. Then the court denied petitioner's motion for reargument, which in part asserted that interjection and determination of the issue of estoppel *vel non* without notice to petitioner that such an issue was being considered and without affording petitioner an opportunity to argue as to its merits was a deprivation of rights guaranteed to petitioner by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States. Petitioner respectfully submits that thereby the Court of Appeals of Maryland decided a federal question of substance in a way probably not in accord with applicable decisions of this Court.

Such decisions of this Court, extending from *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187 (1965), to *Grannis v. Ordean*, 234 U.S. 385, 34 S.Ct. 779 (1914), and beyond, have uniformly held that notice and an opportunity to be heard are among the most elemental attributes of due process of law. Thus in *Armstrong, supra*, dealing with requirements for notice to a divorced father, said not to be supporting the child, of proceedings to adopt his daughter, under a Texas law which dispensed with any need for the father's consent if he was not supporting the child, this Court said:

> "In disposing of the first issue, there is no occasion to linger long. It is clear that failure to give the petitioner notice of the pending adoption proceedings violated the most rudimentary demands of due process of law. 'Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' Mullane v. Central Hanover Bank & Tr. Co., 339 U.S. 306 at 313, 70 S.Ct. 652, at 656, 94 L.Ed. 865. * * *" (380 U.S. at 550, 85 S.Ct. at 1190)
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> * * *
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> "A fundamental requirement of due process is 'the opportunity to be heard.' Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783. It is an opportunity which must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place. * * *" (380 U.S. at 552, 85 S.Ct. at 1191)

Grannis, supra, is perhaps of special interest because there, as here, the Federal right involved was first raised (in a petition for reargument) and denied in the highest state court.

That was held to be sufficient to confer jurisdiction upon this Court, because there, as here, the Federal right was first infringed at the highest state level. (234 U.S. at 292, 34 S.Ct. at 782) The constitutional issue there had to do with the validity of service, by publication and mailing of a summons in a suit for partition of land lying in Minnesota, upon a Wisconsin resident who was a judgment creditor of one of the concurrent owners of the land. The question was whether that service constituted due process of law sufficient to confer jurisdiction on the Minnesota court to render a judgment in the partition case which would be binding upon an assignee of the judgment creditor as to his lien upon or interest in the land, he not having appeared in the Minnesota case. This Court, holding that there had been due process in the partition case, noted that:

> "The fundamental requisite of due process of law is the opportunity to be heard. * * *" (234 U.S. at 394, 34 S.Ct. at 783)

Petitioner suggests that the comments of this Court as to the need for notice and an opportunity to be heard are as applicable to an issue in a proceeding as they are to the case itself, especially when that issue is one upon which judgment is based, as was the situation in the Court of Appeals of Maryland with respect to the estoppel issue. That fundamental fairness which is requisite to the validity of any adversary proceeding must include at least an opportunity to know of and to be heard on such an issue. But petitioner was denied even that much below.

This Court has held that equal protection of the laws is secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government. *Duncan v. State of Missouri*, 152 U.S. 377, 382, 14 S.Ct. 570, 572 (1894). But petitioner was not treated like all other litigants in the Court of Appeals of Maryland. By its rules and decisions that court has made known that it "will not ordinarily decide any point or question which does not palinly appear to have been decided by the lower court",

Maryland Rules of Procedure, Rule 885, and that even if a point is raised and decided in the trial court, it is still taken as having been waived if it is not briefed on appeal, *Harmon v. State Roads Commission*, 242 Md. 24, 217 A.2d 513 (1966). But the court treated petitioner according to some different rule. Prior to the court's opinion being filed, the estoppel issue had not even been mentioned in the case, yet that issue was made a basis of decision.

Nor is it meaningful to point to Mascaro's mention of "unclean hands" in his answer to petitioner's bill of complaint. Mascaro specified in his answer that he based that contention solely on petitioner's failure to aver in its bill as a basis for its claims its franchise agreement with Snelling and Snelling, Inc. Under such a pleading there would scarcely seem to be room to assert that petitioner ought to be estopped because Drossner saw fit to obtain other franchises from Snelling and Snelling, Inc. Ordinarily Maryland limits litigants to the subject matter and substance of their pleadings. Yet here the court itself apparently indulged in a substantial departure from the pleadings. The Court of Appeals of Maryland did not afford petitioner the equal protection of the laws, as it was required to do.

The federal constitutional question is of importance in the administration of justice.

The question presented by this case as to the ability of a state court of last resort, or any court, to base judgment on an issue as to which neither notice nor an opportunity for hearing is first afforded an affected litigant is one of critical importance in the administration of justice. The concept that a court can, in the face of Federal constitutional guarantees, validly act in such a manner is a formidable one. It goes to the roots of our system of jurisprudence. It threatens the foundations of due process. *Armstrong v. Manzo, supra, Grannis v. Ordean, supra.* It deprives all judicial proceedings of any order or certainty. This Court should not condone such action in any degree. Any deprivation of constitutional right requires prompt rectification.

Watson v. City of Memphis, Tenn., 373 U.S. 526, 538, 83 S.Ct. 1314, 1321 (1963).

The federal constitutional question pervades the whole case.

There is no adequate ground, unaffected by the Federal constitutional question here involved, sufficient to support the judgment and action of the court below. In its opinion, prior to raising the estoppel basis for its judgment, the Court of Appeals of Maryland, over the dissent of Judge Barnes, set out its disagreement with the construction which had been placed by the trial court on petitioner's "exclusive right" contract with Snelling and Snelling, Inc. The majority concluded that petitioner's right to use the trade name in issue in Baltimore was not exclusive at all, but was restricted, and that Snelling and Snelling, Inc. could sell to Mascaro the right to use the same name (the "exclusive right" to the use of which it had already sold to petitioner, for very substantial considerations, as it developed), in the same place and in competition with petitioner, so long as Mascaro's use was not connected with petitioner's Baltimore office! Aside from the question what such a construction does to the key characteristic of petitioner's contract, its "*exclusive* right" provision, the language being construed is at best ambiguous. It is at least as susceptible to the construction, favorable to petitioner, placed upon it by the trial court and for which petitioner contended in the court below, as it is to the interpretation adopted by the court below. That court should instead have followed the salutary rule, in force in both Maryland, *Cadem v. Nanna*, 243 Md. 536, 221 A.2d 703 (1966), and in Pennsylvania, *Kennedy v. Erkman*, 389 Pa. 651, 133 A.2d 550 (1957), where petitioner's contract was made, requiring construction of ambiguous language in a contract most strongly against the one who prepared it, in this instance Snelling and Snelling, Inc., through which Mascaro claimed, and should have afforded the contract the meaning placed upon it by the trial court. The court

instead misconstrued and in effect rewrote the contract, so that instead of having an exclusive right to use the trade name in issue in connection with one office *only* in Baltimore, petitioner was left with an utterly meaningless "exclusive" right to use that name *only* in connection with one office in that city.

Petitioner has no means of measuring the importance of the estoppel premise to the process by which the majority of the Court of Appeals of Maryland reached the result which it attained in this cause, but must assume that the issue had a substantial effect indeed, especially since it operated to support what petitioner says is an otherwise erroneous determination of the meaning of the contractual provision in issue. The estoppel argument certainly had an appreciable effect on the minds of the majority below. Otherwise the court would not have imported the estoppel point into the case. That the effect of that point cannot be separated from that of other factors which the court may have considered is a circumstance operating to confer jurisdiction on this Court. *Cf. Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 37 S.Ct. 318 (1917), where this Court declined jurisdiction in a case involving claims that a decision of the Nebraska state board of irrigation in favor of the asserted right of a canal company was not made upon due process because it was made without lawful notice or opportunity to be heard and hence could not be binding upon others interested in project involved, because the highest state court, which had decided against the due process contentions, had also decided that the canal company was entitled to prevail because its adversaries were estopped by their own conduct to question the canal company's claims.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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